In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 417

HOWARD G. PINDER, SR., AND HOWARD G. PINDER, JR., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 1a) is not yet reported. The order of the district court (R. 208-214) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1962 (Pet. 3a). A petition for rehearing was denied on August 9, 1962 (Pet. 4a). The petition for a writ of certiorari was filed on September 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judge sitting in the jurisdiction by designation, until a specified date "and for such further time as may be required to complete unfinished business", had authority to accept petitioners' pleas of guilty and impose sentence after the date specified.

STATEMENT

In the United States District Court for the Southern District of Florida, petitioners were convicted, upon pleas of guilty, of violations of the wagering tax laws. On December 28, 1959, the petitioner Pinder, Sr. was sentenced to imprisonment for 5 years and the petitioner Pinder, Jr. to imprisonment of 1 year. In each case the execution of sentence was suspended and the petitioners placed upon probation for 5 years conditioned upon the payment of fines. An appeal urging grounds not here pertinent was dismissed (*sub nom. Barnhill* v. *United States*, 279 F. 2d 105 (C.A. 5)), and this Court denied a petition for a writ of certiorari (364 U.S. 824).

The present proceeding was initiated in 1961 by motion to set aside the convictions. The motion challenged the authority of the trial judge, Honorable William C. Mathes of the Southern District of California, to sit in the Southern District of Florida to receive petitioners' pleas of guilty and to pronounce sentence. The motion contended that at the time of the acceptance of the pleas the designation under which the judge sat by assignment of the Chief Justice of the United States, had expired. The facts as to this allegation, which are not in dispute, are as follows:

1. Judge Mathes was designated by Mr. Chief Justice Warren "to perform the duties of District Judge

and to hold a District Court in the Southern District of Florida during the period beginning August 17, 1959, and ending September 18, 1959, and for such further time as may be required to complete unfinished business" (R. 231).

On September 15, 1959, at a time when petitioners were awaiting trial on pleas of not guilty previously entered in three cases, Judge Mathes conduced a hearing on the petitioners' numerous pending motions. The judge ordered the three cases consolidated for trial, ruled upon motions for a bill of particulars, for the return of seized property and for the suppression of evidence, and granted a motion for discovery and inspection. On September 23, 1959, Judge Mathes, still sitting in the Florida District Court, entered an order continuing the trial of the consolidated cases. On December 15, 1959, he again ruled upon several motions of the petitioners filed on that day, and, on the same day, he granted the government's motions to dismiss several counts against petitioners in the pending cases. On December 15, 1959, petitioners withdrew pleas of not guilty and entered pleas of guilty, and the cases were referred for presentence investigation. Thereafter, on December 28, 1959, Judge Mathes in open court entered judgments against the defendants and imposed the sentences now attacked (See Order of the District Court dated November 16, 1961; R. 208-214).

2. In its order of November 16, 1961, denying petitioners' motion to set aside the judgments, the district court noted that in each instance where Judge Mathes acted with respect to petitioners after September 18, 1959, he was acting "while still sitting in this Court in Miami". The court held that Judge Mathes was at

least a judge *de facto*, if not a judge *de jure* and that petitioners, having recognized his authority when they entered their pleas and appealed from the judgment without raising a jurisdictional question, were in no position to challenge his authority collaterally. The court also held that Judge Mathes, after September 18, 1959, and until the judgments were entered on December 18, 1959, was completing "unfinished business;" and that the proceedings involving petitioners were, from the time of the entry of pleas of not guilty until final disposition, "unfinished business".

The court of appeals affirmed on the ground that Judge Mathes had authority to act at the time the challenged orders were issued, both because he was completing "unfinished business" as to petitioners' cases, and because his presence in the Southern District of Florida was still required to complete other unfinished business.

ARGUMENT

Petitioners contend that 28 U.S.C. 296[1] did not authorize Judge Mathes to enter the orders of conviction and sentence here questioned. That may or may not be. But there is no occasion for this Court to consider the question, for Judge Mathes' authority to dispose of these cases derived, not from this statute, but from the designation of the Chief Justice. The statute "gives an extension when the designation does not contain any,

[1] 28 U.S.C. 296 provides in pertinent part: "A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

and does not affect the power of the Chief Justice to make the designation last ex proprio vigore * * * " (Judge Learned Hand in *United States* v. *Garsson*, 291 Fed. 646, 648 (D.C. S.D. N.Y.).

The designation here specifically provided that the term should run for "such further time as may be required to complete unfinished business." As the court below pointed out, Judge Mathes had authority to sit under this designation since his presence in Florida was required to dispose of these cases as well as other cases.

Moreover, even if the facts did not show, as they do, that Judge Mathes was a judge *de jure*, he would have been at least a judge *de facto*. See *Ball* v. *United States*, 140 U.S. 118; *McDowell* v. *United States*, 159 U.S. 596; *Ex parte Ward*, 173 U.S. 452; *Leary* v. *United States*, 268 F. 2d 623 (C.A. 9). Hence petitioners cannot challenge his authority in this collateral proceeding.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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